MUSTAFA OSMAN

v

LEE CHUA (P)

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA
DATUK MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: M-04-46 OF 1995]
17 APRIL 1996

LAND LAW: *Tenancy agreement – Land governed by s. 108 National Land Code (Penang and Malacca) Titles Act 1963 – Prohibition against leasing etc. of land to persons other than a Malay – Agreement executed in violation of prohibition – Whether agreement void for illegality – Claim for vacant possession – Whether could be based upon an illegal tenancy agreement.*

CONTRACT: *Assignment – Property in land – Assignment agreement executed in violation of statute – Parties in pari delicto at time of execution of agreement – Whether void ab initio – Property in chattels and land – Whether could pass under an illegal contract – National Land Code (Penang and Malacca) Titles Act 1963 s. 108 – Contracts Act 1950 s. 66.*

The plaintiff is the proprietor of a piece of land and the house that stood on it. The land was governed by s. 108 of the National Land Code (Penang and Malacca) Titles Act 1963, with the result that it could not be transferred, leased, transmitted or charged to any person other than a Malay. The prohibition notwithstanding, and in clear violation thereof, the plaintiff assigned the premises to the defendant for a sum of RM10,000, and let that portion of the land on which the house stood for RM15 a month.

The plaintiff subsequently sought to evict the defendant from the land, and in consequence, initiated proceedings for vacant possession of the same. The plaintiff based his claim on the tenancy agreement, arguing in the Court below that the defendant had breached the terms of the agreement. The learned Judicial Commissioner, reversing the learned Magistrate, found the tenancy agreement to be illegal, and on that ground ruled the claim unsustainable. The plaintiff appealed, and contended that the effect of the Judicial Commissioner's decision was to permit the occupation of land by one who is disabled by statute from having possession. This apart, to support the appeal, reliance was also placed on the decision of the Privy Council in *Amar Singh v. Kulubya.*

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] The tenancy agreement was clearly caught by the prohibition in s. 108 and it is illegal and void *ab initio*. Illegality, however, need not be specifically pleaded, and once it is brought to the attention of the Court, the Court, upon being satisfied that the transaction is indeed illegal, is obliged to act upon it.

[2] The set pattern that emerged in *Amar Singh* is set apart from the present case because there the plaintiff merely referred to the illegal agreements in his pleading but did not base his action for vacant possession upon them. Here, the statement of claim claimed vacant possession expressly on the basis that the defendant had acted in breach of the tenancy agreement and accordingly plaintiff relied upon the illegality to claim possession of the land. This, therefore is a case where the maxim *ex turpi causa non oritur actio* applies with full rigour.

[3] The parties in the present case were *in pari delicto* when they entered into the illegal tenancy agreement. After all the tenancy was prepared by a solicitor. This is, therefore, not a case where the contract may be said to be discovered to be void under s. 66 of the Contracts Act 1950.

[4] It is settled law that property in chattels and land can pass under an illegal, and therefore unenforceable, contract. Consequently, the property in the house having passed to the defendant, and he having been put in occupation of the land, the loss should lie where it has fallen.

[Appeal dismissed]

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG TANAH:** Perjanjian sewaan – Tanah dikuasai oleh s. 108 Akta Hakmilik Kanun Tanah Negara (Pulau Pinang dan Melaka) 1963 – Larangan memajak tanah dll. kepada orang-orang yang selain daripada orang Melayu – Perjanjian yang disempurnakan melanggari larangan – Samada perjanjian tak sah kerana kepenyalahan undang-undang – Tuntutan untuk milikan kosong – Samada boleh diasaskan ke atas satu perjanjian sewaan yang tak sah.*

***KONTRAK:** Serahanhak – Hartanah – Perjanjian serahanhak yang disempurnakan melanggari statut – Pihak-pihak in pari delicto pada waktu penyempurnaan perjanjian – Samada tak sah ab initio – Harta dalam bentuk chatel dan tanah – Samada boleh terpindah di bawah kontrak yang menyalahi undang-undang – Akta Hakmilik Kanun Tanah Negara (Pulau Pinang & Melaka) 1963 s. 108 – Akta Kontrak 1950 s. 66.*

Plaintif adalah tuanpunya sebidang tanah dan rumah yang terdiri di atasnya. Tanah tersebut dikuasai oleh s. 108 Akta Hakmilik Kanun Tanah Negara (Pulau Pinang & Melaka) 1963, yang mengakibatkan bahwa tanah tersebut tidak boleh dipindahmilik, dipajak, dipindahkan atau digadaikan kepada mana-mana orang yang lain daripada orang Melayu. Tanpa menghiraukan larangan tersebut, dan dengan jelas melanggarinya, plaintif telah menyerahhak premis tersebut kepada defendan bagi satu jumlah sebanyak RM10,000 dan menyewakan bahagian tanah di mana terdirinya rumah tersebut bagi bayaran sebanyak RM15 sebulan.

Plaintif kemudiannya berusaha untuk mengusir defendan daripada tanah tersebut, dan akibat daripada itu, telah memulakan prosiding untuk milikan kosong. Plaintif menuntut berdasarkan perjanjian sewaan yang berkenaan, dan menghujah dalam Mahkamah di bawah bahawa defendan telah memungkiri terma-terma perjanjian tersebut. Pesuruhjaya Kehakiman yang bijaksana, dalam mengakaskan keputusan Majistret yang bijaksana, mendapati perjanjian sewaan tersebut tidak sah, dan atas alasan itu memutuskan bahawa tuntutan plaintif tidak boleh dipertahankan. Plaintif telah merayu, dan menegaskan bahawa kesan keputusan Pesuruhjaya Kehakiman tersebut ialah bahawa ianya memberi kebenaran penghunian tanah kepada seorang yang tidak dibolehkan oleh statut untuk mempunyai milikan. Selain daripada itu, bagi menyokong rayuan tersebut, dikemukakan juga keputusan Majlis Privi dalam *Amar Singh v Kulubya*.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Perjanjian sewaan tersebut jelas dirangkumi oleh larangan dalam s. 108 dan ianya adalah tak sah dan terbatal *ab initio.* Kepenyalahan undang-undang, namun begitu tidak seharusnya diplidkan dengan khususnya, dan sebaik sahaja ianya di bawa ke perhatian Mahkamah, Mahkamah tersebut, setelah berpuashati bahawa transaksi tersebut sesungguhnya tak sah, adalah berkewajipan untuk bertindak terhadapnya.

[2] Corak teladan yang terbit dalam *Amar Singh* adalah berlainan daripada kes semasa ini kerana di situ plaintif hanya merujuk kepada perjanjian-perjanjian tak sah dalam plidingnya tetapi tidak mengasaskan tindakannya ke atas milikan kosongnya. Di sini, pernyataan tuntutan plaintif menuntut milikan kosong dengan nyatanya atas dasar bahawa defendan telah bertindak dalam kemungkiran perjanjian sewaan tersebut. Berikutan itu plaintif telah bergantung ke atas kepenyalahan undang-undang untuk menuntut milikan kosong tanah. Dengan itu, ini merupakan kes di mana maksim *ex turpi causa non oriter actio* terpakai sepenuhnya.

[3] Pihak-pihak dalam kes semasa ini berada dalam *pari delicto* bilamana mereka memasuki perjanjian sewaan yang menyalahi undang-undang. Sementelah perjanjian sewaan tersebut telah disediakan oleh seorang

peguamcara. Ini adalah, dengan itu, bukannya merupakan kes di mana kontrak tersebut boleh dikatakan telah didapati terbatal di bawah s. 66 Akta Kontrak 1950.

[4] Ianya merupakan undang-undang yang terpakai bahawa hartanah dan harta dalam bentuk chatel boleh dipindahkan dalam sesuatu kontrak yang salah atau yang tidak boleh dikuatkuasakan di sisi undang-undang. Akibatnya, oleh kerana harta dalam bentuk rumah tersebut telah dipindahkan kepada defendan, dan beliau telah pun menghuni tanah tersebut, maka kerugian harus dikekalkan di mana ianya berlaku.

[Rayuan ditolak]

Cases referred to:
Natha Singh v. Syed Abdul Rahman & Anor. [1962] MLJ 265 ***(refd)***
Nasib Singh v. Ramasamy [1969] 1 MLJ 211 ***(refd)***
Amar Singh v. Kulubya [1963] 3 All ER 499 ***(dist)***
Soh Eng Keng v. Lim Chin Wah [1979] 2 MLJ 91 ***(refd)***
Tinsley v. Miligan [1993] 3 All ER 65 ***(refd)***
Lye Thai Sang & Anor. v. Faber Merlin (M) Sdn. Bhd. & Ors. [1986] 1 MLJ 166 ***(cit)***

Legislation referred to:
National Land Code (Penang & Malacca) Titles Act 1963, s. 108
Contracts Act 1950, s. 66

For the appellant - Ravinathan; M/s. Badaruzaman Chandran & Co.
For the respondent - Michael Tan Lip Yip (Goh What Sing with him); M/s. Ng, Goh & Co.

JUDGMENT

Gopal Sri Ram JCA:

This is an appeal from the decision of Judicial Commissioner Suriyadi bin Halim Omar, reversing the decision of the Magistrate's Court at Melaka given in two related actions. Despite the existence of two separate and distinct proceedings, the parties and the Courts at both levels have dealt with only one of them. This course was adopted on the footing that the decision in the one case shall determine the outcome of the other. We will follow the example set by both Courts below and also deal with the case dealt with by them.

The appellant before us was plaintiff in the action before the Magistrate, and the respondent, the defendant to that action. For convenience, we will refer to the parties according to the title assigned to them in the trial Court.

The facts relevant to the appeal are as follows.

The plaintiff is the registered proprietor of the land under Lot 66, Kawasan Bandar XXXVI. There is a house on the land. It is occupied by the defendant.

a The land in question is governed by s. 108 of the National Land Code (Penang and Malacca) Titles Act, 1963, which prohibits it from being transferred, leased, transmitted or charged to any person other than a Malay. The section goes on to include, within the definition of the expression "lease", any tenancy of whatever form or duration.

b By a deed of assignment dated 9 March 1981, the plaintiff absolutely assigned the house to the defendant for a sum of RM10,000. By an agreement of the same date ("the tenancy agreement), the plaintiff let to the defendant that portion of the land on which the house stands, at a monthly rent of RM15. Both documents were prepared by a solicitor. Needless to say that the tenancy c agreement was caught by the prohibition contained in s. 108.

On 28 May 1993, the plaintiff purported to give to the defendant a notice terminating the tenancy and requiring the latter to quit and deliver vacant possession of the premises. The statement of claim accompanying the summons, d in paragraph 3, expressly pleads and relies upon the tenancy agreement. In paragraph 6 of his pleading, the plaintiff alleges the defendant's failure to abide by the terms of the tenancy agreement and the notice to quit.

The defendant, in his defence and counterclaim, challenged the validity of the notice to quit, alleged that it was the plaintiff who was in breach of the terms e of the tenancy agreement and claimed damages for breach. Up to the delivery of this pleading, it does not appear to have been appreciated by either side that the tenancy agreement was utterly illegal and void *ab initio.*

When the action was called on for hearing, realisation of the true legal position f must have dawned upon the defendant. Although she had not pleaded illegality, she purported to take the point as a preliminary objection as to the *locus standi* of the plaintiff to bring or to maintain the action. This was quite wrong of course. What ought to have been done was to move an amendment and to properly take the point in the defence. Nevertheless, once the illegality of the tenancy had been raised, based upon the agreed documents, the Court was g obliged to deal with it.

We accept as beyond argument that illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the Court before whom the action is being tried, the Court, upon being satisfied that the transaction is h indeed illegal, is obliged to act upon it. See, *Natha Singh v. Syed Abdul Rahman & Anor*. [1962] MLJ 265; *Nasib Singh v. Ramasamy* [1969] 1 MLJ 211.

Consequently, despite the clumsy way in which the proceedings were conducted by Counsel, the Magistrate quite properly heard argument and decided in favour i of the plaintiff. Having held the tenancy agreement to be void for illegality, she nevertheless ordered the defendant to vacate the land and the premises. Her decision was on the footing that the defendant was a monthly tenant, so

that the notice to quit had the effect of terminating the relationship of landlord and tenant. She also dismissed the counterclaim.

The defendant then appealed to the Judicial Commissioner who, as we observed at the outset, reversed the Magistrate but, quite rightly, does not appear to have interfered with her order dismissing the counterclaim.

In arriving at his decision, the learned Judicial Commissioner correctly proceeded on the basis that the tenancy agreement was illegal and void. He was much impressed with the injustice of the case. For, here was a plaintiff who had received a large sum of money from the defendant whom he was now seeking to eject and thereby enrich himself. After having reviewed a number of authorities, he turned his attention to the statement of claim which, as we have said, based the plaintiff's claim for vacant possession upon the illegal agreement. The learned Judicial Commissioner, applying well-settled principles, found the claim to be unsustainable and dismissed the plaintiff's action.

Before us, Counsel for the plaintiff, sought to attack the learned Judicial Commissioner's judgment principally in reliance upon the decision of the Privy Council in *Amar Singh v. Kulubya* [1963] 3 All ER 499. It therefore becomes necessary for us to enter upon a discussion of that case.

In *Amar Singh*, the respondent, Kulubya, an African, owned some Mailo land. He agreed to lease three plots to the appellant, Amar Singh, an Indian, without obtaining the consents that were made necessary by the relevant East African legislation. The respondent allowed the appellant to remain in possession of the land. Later, he brought an action to recover possession, as well as rent, mesne profits and damages. The appellant pleaded the illegality. Thereupon, the respondent abandoned his claims for rent, mesne profits and damages and confined his claim to vacant possession. The trial Judge dismissed the action. On appeal, the East African Court of Appeal reversed the Judge and granted the respondent vacant possession. On further appeal, the Judicial Committee dismissed the appeal.

Lord Morris of Borth-y-Gest, when delivering the advice of the Board explained the rationale for the decision in words that mark the distinction between that case and the present:

> Their Lordships consider therefore that **the plaintiff's right to possession was in no way based on the purported agreements.** It was the defendant who might have needed to rely on them, because, had they been valid and permissible agreements, the defendant would have contended that the tenancies would have needed for their termination longer periods of notice than those contained in the notices to quit that were given. As it was, the contention of the defendant (based on para. 3 of the defence) was that the plaintiff was disabled from suing because he had been a party to illegal agreements. **It was quite correct, as set out in that paragraph of the defence, that the plaintiff had been a party to illegal**

> **agreements. At the time of the trial, however, he was not basing his claim 'on the said agreements'**. Indeed he could have presented his claim (if it were limited to a claim for possession) without being under any necessity of setting out the unlawful agreements in his plaint. **He required no aid from the illegal transactions in order to establish his case.** (Compare *Simpson v. Bloss* [1816] 7 Taunt. 246). It was sufficient for him to show that he was the registered proprietor of the plots of land and that the defendant who was a non-African was in occupation without possessing the consent in writing of the Governor for such occupation and accordingly had no right to occupy. It is true that the plaintiff referred to the purported agreements to which he had been a party and that he repudiated them and acknowledged that they were illegal. It was, however, in spite of and not because of those illegal agreements that he was entitled to possession. Though the plaintiff had offended by being a party to the illegal and ineffective agreements their Lordships do not consider that considerations of public policy demanded the failure of his claim for possession: on the contrary such considerations pointed to the necessity of upholding it in order to eject a non-African who was in unlawful occupation. (Emphasis added).

It will be seen at once that the fact pattern that emerged in *Amar Singh* is set apart from the present case because there the plaintiff merely referred to the illegal agreements in his pleading but did not base his action for vacant possession upon them. The present appeal stands on a different footing altogether. Here, the statement of claim claimed vacant possession expressly on the basis that the defendant had acted in breach of the tenancy agreement. Accordingly, plaintiff relied upon the illegality to claim possession of the land. This, therefore, is a case where the maxim *ex turpi causa non oritur actio* applies with full vigour. It is a misfortune that Counsel who argued the appeal before us was unable to comprehend this rather simple and obvious distinction in principle despite it being explained to him more than once during argument.

It cannot be doubted for a moment that the parties in the present case were in *pari delicto* when they entered into the illegal tenancy agreement. After all, the tenancy agreement was prepared by a solicitor. This is, therefore, not a case where the contract may be said to be discovered to be void under s. 66 of the Contracts Act, 1950. See, *Soh Eng Keng v. Lim Chin Wah* [1979] 2 MLJ 91.

Counsel argued that the effect of the Judicial Commissioner's decision was to permit the occupation of land by one who is disabled by statute from having possession. There is a short answer to this rather over-simplified statement of consequence. It is the plaintiff who offended the terms of the statute and risks forfeiture of the land by the State Authority. For, unlike the East African legislation in *Amar Singh*, the National Land Code (Penang & Malacca) Titles Act, 1963 does not impose any criminal sanction upon an occupant of land to which s. 108 applies. It is settled law that property in chattels and land can pass under an illegal, and therefore unenforceable, contract. See, *Tinsley v. Milligan* [1993] 3 All ER 65, 86. Consequently, the property in the house

having passed to the defendant, and he having been put in occupation of the land, the loss should lie where it has fallen.

We have examined the judgment of the learned Judicial Commissioner with care and have been unable to detect any error of reasoning. In fairness to him, we must say that we find his reasoning and his discussion of the authorities, which in this area of the law are not easily understood, to be beyond criticism.

Accordingly, we dismissed the appeal and affirmed all the orders made by the learned Judicial Commissioner. We also ordered costs in favour of the respondent and directed the payment out to her of the deposit paid into Court to account of her taxed costs. The result in this appeal will bind all connected cases.

Before we conclude this judgment, there is one matter we would refer by way of postscript. Several days after we had dismissed the appeal, solicitors for the appellant before us wrote a letter requesting a review of the case. We, of course, have no jurisdiction to conduct such an exercise. See, *Lye Thai Sang & Anor. v. Faber Merlin (M) Sdn. Bhd. & Ors.* [1986] 1 MLJ 166. That apart, we find the letter to be couched in intemperate language.

Advocates and solicitors must appreciate their true role if they are to play a meaningful part in the administration of justice. They must accept, with courtesy and dignity, decisions which the Courts hand down in any case. Taking an unfavourable result in a case as a personal affront to Counsel is not consonant with the role of an advocate. We trust that we will not have to issue a similar reminder to other advocates who appear before us.

Reported by W.A. Sharif